IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-846

JOHN W. WINGO, Warden
Kentucky State Penitentiary, Eddyville, Kentucky

Petitioner,

v.

CARL JAMES WEDDING

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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OPINION BELOW

The opinion below from the United States Court of Appeals for the Sixth Circuit is reported as *Wedding v. Wingo*, 483 F.2d 1131 (6th Cir., 1973), and is correctly set forth in the Appendix beginning at page 61.

JURISDICTION

The jurisdiction for the Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was properly invoked by the petitioner under 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER THE FEDERAL MAGISTRATES ACT, 28 U.S.C. §631 ET SEQ., EMPOWERS A UNITED STATES MAGISTRATE TO HOLD EVIDENTIARY HEARINGS INVOLVING RELIEF UNDER 28 U.S.C. §2241 ET SEQ.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner correctly stated the Constitutional and Statutory provisions involved, and are to be found on page 2 of petitioner's brief.

STATEMENT OF THE CASE

The respondent accepts, as being substantially correct, the petitioner's Statement of the Case, which is found at pages 2-4 of petitioner's brief.

ARGUMENT

I.

WHETHER THE FEDERAL MAGISTRATE'S ACT, 28 U.S.C. §631 ET SEQ., EMPOWERS A UNITED STATES MAGISTRATE TO HOLD EVIDENTIARY HEARINGS INVOLVING RELIEF UNDER 28 U.S.C. §2241 ET SEQ.

The Federal Magistrate's Act, (hereinafter referred to as the Act) 28 U.S.C. §631, et seq., created the position of United States Magistrate (hereinafter referred to as Magistrate) by appointment of the Court, in the various judicial districts. The jurisdiction and powers of the Magistrate are established in 28 U.S.C. §636, and are set forth, in pertinent part, as follows:

> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment–
>
> (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
>
> (2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgments, affidavits, and depositions; and
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.
>
> (b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time

magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to–

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as whether there should be a hearing.

(c) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(d) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof

as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing, refusal to take the oath of affirmation as a witness, or having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court, would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

With regard to the Act itself, the respondent calls the Court's attention to three (3) particular subsections of 28 U.S.C. §636. Those being:

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment–

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts; . . .

(2) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of this section.

(b) . . . The additional duties authorized by rule man include, but are not restricted to–

(3) *preliminary review* of applications for post-trial relief made by individuals convicted of criminal offenses, *and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.* (Emphasis added).

In *Holiday v. Johnston*, 313 U.S. 342, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941), this Court held that a United States Commissioner was without authority to hold evidentiary hearings on federal habeas corpus petitions. In its opinion this Court reasoned, at page 352, that:

> One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. *We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts.* (Emphasis added).

This Court then went on to hold, at pages 353-354, that:

> The District Judge should *himself* have heard the prisoner's testimony and, in light of it and other

> testimony, *himself* have found the facts and based his disposition of the cause upon *his* findings. (Emphasis added).

In 1971, the United States Court of Appeals for the Sixth Circuit, utilizing the above language from *Holiday v. Johnston, supra,* reversed a matter where a Special Master (actually a duly appointed United States Commissioner) had been appointed to hold an evidentiary hearing on a federal habeas corpus petition. *Payne v. Wingo,* 422 F.2d 1192 (1971). This case was later followed by *Green v. United States,* 445 F.2d 847 (6th Cir., 1971).

In *Payne v. Wingo, supra,* at page 1194, the Court went on to discuss that the Federal Rules of Civil Procedure "provide no authority for the delegation of the conduct of habeas corpus evidentiary hearing to a Special Master." Moreover, the Court considered the tremendous case load of the district courts, and on that point stated, at page 1194:

> . . . Nevertheless we must be ever mindful of the fundamental role that habeas corpus plays in our judicial system. Without a *clear* mandate from Congress, we cannot presume that that body would entrust a vital and often conclusive part of habeas corpus to an official, like a Special Master, who lacks the independence and authority of the federal judiciary. (Emphasis added).

It is noteworthy to observe that *Holiday v. Johnston, supra,* was decided on the basis of 28 U.S.C. §457, 458 and 461, and principally upon §461. Those sections were incorporated within 28 U.S.C. §2243 enacted June 25, 1948. (*Holiday v. Johnston, supra,* and Reviser's note: 28 U.S.C.A. §2243).

Further, in *Payne v. Wingo, supra,* the Court discussed 28 U.S.C. §461 and its successor 28 U.S.C. §2243 with

regard to the terms "the court, or justice, or judge." At page 1194, the Court stated:

> . . . Although the statute interpreted in Holiday authorized 'the court, or justice or judge' to determine the facts, and the current provision merely refers to 'the court', we do not find the difference significant. The Supreme Court in Holiday essentially held that the phrase 'court, justice, or judge' in 28 U.S.C. §461 referred to a federal judge rather than a commissioner. Since these words were phrased in the alternative in that statute, the Supreme Court in Holiday found that the word 'court' was the equivalent of the word 'judge' for purposes of 28 U.S.C. §461. When Congress retained the reference to the 'court' in the new statute, it must have meant to retain the meaning that the Supreme Court gave that word in the preceding statute. Assuming, without deciding that Congress could have constitutionally changed the result of Holiday by a specific provision in Section 2243, it is evident that Congress chose not to do so. We are not at liberty to disturb that decision.

18 U.S.C. §3401, discussed in the jurisdiction and powers section of the Act (§636) does not discuss civil proceedings in any form.

Remaining, then, is subsection (b)(3) of the Act which discusses additional duties of the Magistrate. Respondent urges that the language of that subsection is clear and concise and should be interpreted literally, that is,

> . . . The additional duties authorized by rules may include. . .
>
> (3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, *and submission of a report and recommendations to facilitate*

> *the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.* (Emphasis added).

The legislative history of the Act is somewhat instructive on the issue in question, in that it does not mention any provision for allowing Magistrates the authority for holding evidentiary hearings on habeas corpus hearings. In point of fact, under the provision *Purpose of Legislation*, U.S. Code Congressional and Administrative News, Vol. 3, 1968, p. 4254, it is stated that:

> In summary, §945 is intended both to update and make more effective a system that has not been altered basically for over a century, and to cull from the evergrowing workload of the U.S. district courts matters that are desirably performed by a *lower tier* of judicial officers. (Emphasis added).

Unquestionably, at the legislative hearings on the Act, there were discussions about the Magistrates holding evidentiary hearings, some of which the petitioner has incorporated in his brief, pp. 7-12. However, in light of these discussions, the legislation was enacted without any authoritative provisions for the Magistrate holding such hearings.

The petitioner has cited *Noorlander v. Ciccone*, 489 F.2d 642 (8th Cir., 1973) in support of his argument that Magistrates are empowered to conduct evidentiary hearings in habeas corpus matters. The respondent believes that one paragraph of that opinion is particularly important for consideration. In *Noorlander, supra*, at p. 647, the Court states:

> In summary, it is apparent that the holding of hearings, at least in postconviction cases, *was at first considered by Congress to be one of the duties*

properly assignable to magistrates. In the face of opposition, Congress left out any specific delegation of the power to hold hearings to the magistrates, and in effect skirted the issue by saying only that the magistrate could perform any function consistent with the Constitution and laws of the United States. (Emphasis added).

In light of the legislative hearings involving the particular subject of habeas corpus evidentiary hearings, and the fact that the Congress did not provide for or specifically empower the Magistrate to hold such hearings, the respondent urges the Congress, therefore, did not intend to provide this authority. Moreover, it seems clear that the Congress intended only to relieve the district judges of the more routine or mundane chores which were and are imposing an increasing burden upon the time and duties of the district judge. As stated in the section, *The Need For The Legislation,* U.S. Code Congressional and Administrative News, Vol. 3, 1968, p. 4257:

> Although the present U.S. commissioner system is in many ways defective, it is neither practical nor desirable simply to abolish the commissioner system and transfer the functions now performed by that office to the U.S. district court judges, who are already overburdened by their present duties and not geographically situated to service the needs of remote areas of the country.
>
> An upgraded system of judicial officers below the level of the district judge can provide significant advantages for the Federal judicial system. By raising the standards of the lowest judicial office and by increasing the scope of the responsibilities that can be discharged by that office, the system will be made capable of increasing the overall efficiency of the Federal judiciary, while at the same time provid-

ing a higher standard of justice at the point where many individuals first come into contact with the courts.

The Act was not intended to make a district judge of the magistrate. Congress only intended to transfer the routine tasks of the district judge to a full-time administrative-judicial officer. Habeas Corpus evidentiary hearings are not routine tasks.

On this point the respondent believes it is important to note that the "Great Writ", as the Writ of Habeas Corpus has been described, is rooted deep in the common law and held to be "a precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnson,* 306 U.S. 19, 59 S.Ct. 442, 83 L.Ed. 455 (1939); *Darr v. Burford,* 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761 (1950). Its origins are deep in English history and "it was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors" *Ex Parte Yerger,* 8 Wall, (75 U.S.) 85, 95 L.Ed. 332.

Respondent cannot keep from observing that some underlying reasoning of the various courts favoring the expansion of Magistrates duties may well involve the fact that the workload of the district courts has dramatically increased through the years. This has been discussed in many articles. In 55 F.R.D. 119, *Has The Time Come?,* 1972, Mr. Chief Justice Burger recited that the district court filings have nearly doubled in the 41 years between 1931 and 1972; from 75,000 filings to 140,000 filings annually. Many, many of these filings are habeas corpus petitions, and they too increase annually, 33 F.R.D. 409, *Suggestions for Lessening the Burden of Frivolous Applications,* by Hon. Walter L. Pope, 1962. In *Noorlander v. Ciccone, supra,* at p. 644, the Court states:

> During the past several years an ever increasing number of prisoner petitions have been filed in federal court by and for inmates of the Springfield Medical Center. One result of this flood of litigation has been a substantial drain of judicial manpower of the Western District of Missouri. Another result has been a substantial delay in processing these cases. In order to provide for prompt disposition of these cases, this rule (Local rule 26) was adopted by the district court en banc and positive efforts have been made by the court, the magistrate, the Public Defenders and the Assistant United States Attorney to reduce this backlog.

It would seem that the better solution to the problem would be the appointment of more district judges. In industry, if the product demand increases, more qualified personnel are added to meet that demand. Qualified is the key word. In this analogy, the qualifications are established by Article 3 of the Constitution of the United States of America.

The respondent believes that another analogy can be accurately recited in support of his position. The Act provides that the Magistrate has "The power to conduct trials of *minor* criminal offenses. . . ." 28 U.S.C. §636(a)(3). Minor offenses have been defined as misdemeanors punishable by imprisonment not exceeding one (1) year, or by a fine not exceeding $1,000.00, or both. 18 U.S.C. §3401, as amended by §302. The great bulk of the postconviction relief claims are filed by persons who have received substantially greater sentences, as for example, the respondent who is serving a life sentence. It seems incongruous that a Magistrate could virtually decide major fact questions in habeas corpus petitions, involving years of a person's liberty, when he is not authorized to decide federal criminal cases involving

penalties exceeding one (1) year or a $1,000.00 fine, or both.

While it is true that the ultimate decision in 28 U.S.C. §2241 et seq. matters does rest with the district court, what assurance would there be, for example, that the district judge would not simply adopt, pro forma, the Findings of Fact and Conclusions of Law submitted by a Magistrate. At least one court has expressed this reservation. In *Rainha v. Cassidy*, 454 F.2d 207 (1st Cir., 1972) the Court, at pp. 207-208, states:

> The Court denied the stay without hearing the parties, relying on a magistrate's report of findings and recommendations based upon an evidentiary hearing before the magistrate. Petitioner appeals.
>
> We are troubled at the outset by this procedure. A magistrate has authority to do certain limited things, and to perform such further duties 'as are not inconsistent with the Constitution and laws of the United States,' as may be determined by the particular district court. 28 U.S.C. §636(b). As a statutory example, we quote subsection (3).
>
> (3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.
>
> While the present case involves a habeas corpus proceeding of a different character, *the thought that the magistrate, rather than recommending a hearing after a perliminary review, could be empowered to conduct the evidentiary hearing himself and make findings of fact, to be approved by a pro forma laying on of hands by the district court without notice, does not appeal to us in the least.*

We do not pursue this matter in the present case because a close questioning of counsel by the single judge of this court to whom a hearing on the application for stay was referred, discloses that in fact petitioner admitted the correctness of certain of respondent's testimony which we regard as foreclosing any possibility of success of petitioner's part. (Emphasis added).

As the Court stated in the case at bar, *Wedding v. Wingo*, 483 F.2d 1131 (6th Cir., 1973), at pp. 1135-1136:

> . . . The original draft of the subsection in the Senate Bill provided that the Magistrate could give:
>
> '. . .
>
> (3) preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses.'
>
> The Judicial Conference of the United States in September, 1966, sent to the Senate a report of its Committee on Criminal Law, which report it had adopted, and which stated as to Section 636(b):
>
> 'The Committee is of the opinion that the enumeration of duties in Section 636(b) as now worded presents a delegation which is so broad in scope and so general as to make this subsection vulnerable to possible constitutional attack . . . .' (Hearings on S.3475 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary. 89th Cong., 2d Sess. (1966) at 241 n.)
>
> *In order to foreclose a broad interpretation of Section 636(b)(3) which would make it vulnerable to constitutional attack, the original Bill was amended and the phrase, 'preliminary consideration of applications for post-trial relief' in the Bill was*

narrowed to 'preliminary review' of the applications and the power and authority of the Magistrate was restricted to 'submission of a report and recommendations to facilitate the decision of the district judge' only as to 'whether there should be a hearing.' It was in this amended and narrowed form that the Act was passed by Congress. (Emphasis added).

Moreover, the Court further noted, at p. 1136, N. 2, that:

> It would appear to us that it would take about the same amount of time for the District Judge to listen to the recording as it would require for him to preside at the evidentiary hearing.

This court, in *Palmore v. United States*, 410 U.S. ___, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973) states at p. 350, that:

> Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed it(s) wishes', *Cheng Fan Kwok v. Immigration and Naturalization Service*, 392 U.S. 206, 212, 20 L.Ed.2d 1037, 88 S.Ct. 1970 (1968).

The respondent submits that if Congress had intended that Magistrates hold evidentiary hearings in habeas corpus matters, then certainly such a provision would have been incorporated within the Act. In light of the hearings and discussions on the Act, heretofore discussed, it is apparent that Congress determined to specifically exclude such hearings. 28 U.S.C. §636 is a jurisdictional statute, and in accordance with *Palmore, supra*, should be construed precisely as it was enacted. It should not be expanded through judicial construction.

Another point of significance is the fact that a Magistrate does not have to be an attorney. 28 U.S.C.

§631(g)(1). While the statute does call for the appointment of members of the bar in good standing within their respective jurisdictions, there is a provision for the appointment of a non-attorney if no qualified member of the bar is available for service. Evidentiary hearings are among the most difficult functions a judicial officer has to perform. Habeas corpus evidentiary hearings represent some of the most technical aspects of the law. It is difficult to consider how a non-lawyer would be able to function in this area.

The respondent urges that the applicable law on this question is still as recited in *Holiday v. Johnston, supra,* and that the enactment of the *Federal Magistrates Act* has not altered its meaning in any way. The District Judge, except in special circumstances involving direct habeas corpus applications to Circuit Judges and the Supreme Court Justices, is the person who has authority, by law, to hold evidentiary hearings on Petitions for Writ of Habeas Corpus. This position has been supported by the Sixth Circuit Court of Appeals in the instant cases, *Wedding v. Wingo, supra;* by the Seventh Circuit Court of Appeals in *TPO, Incorporated v. McMillen,* 460 F.2d 348 (1972); and by the First Circuit Court of Appeals in *Rainha v. Cassidy,* 454 F.2d 207 (1972).

CONCLUSION

The respondent believes that the Congress did not intend to provide the Federal Magistrates with the jurisdiction to conduct evidentiary hearings on habeas corpus matters. For this reason, the respondent submits that the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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